

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

Original

77-6109

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8/5

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

-----x

ANTHONY B. CATALDO and
ADA W. CATALDO,

Appellants,

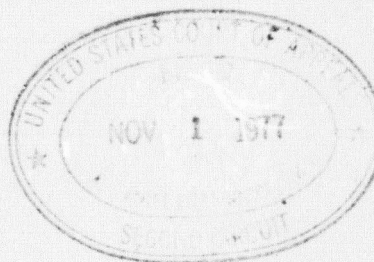
-against-

77-6109

DAVID P. LAND, T. GORMAN REILLY
and ROBERT LEVINE,

Respondents.

-----x



APPELLANTS' APPENDIX

ANTHONY B. CATALDO
Attorney for Appellants,
and pro se
Office & P.O. Address
111 Broadway
New York, N.Y. 10006
212-962-0965

PAGINATION AS IN ORIGINAL COPY

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

----- -x

ANTHONY B. CATALDO and
ADA CATALDO,

Appellants,

-against-

DAVID J. LAND, T. GORMAN REILLY, and
ROBERT LEVINE,

Respondents.

----- -x

RELEVANT DOCKET ENTRIES

December 17, 1974: Petition for Removal--with copy of
Summons and Complaint, Bond and Affidavit of Service

March 26, 1975: Answer

June 16, 1975: Notice of Motion and Affidavits to Strike
Appearance of United States Attorney

June 16, 1975: Affidavit of Henry A. Brachtel in
Opposition to Motion to Strike

July 1, 1975: Decision Denying Motion to Strike

March 23, 1977: Notice of Motion and Affidavits to Dismiss;
Affidavit of Levine in Support of Motion to Dismiss;
Affidavit of Land in Support of Motion to Dismiss;
Affidavit of Reilly in Support of Motion to Dismiss

June 8, 1977: Notice of Cross-Motion for Summary Judgment
and Affidavit of Anthony B. Cataldo; Plaintiff's Counter-
Statement under Rule 9(g)

June 23, 1977: Judgment of Dismissal

PETITION FOR REMOVAL

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - -x

ANTHONY B. CATALDO and
ADA W. CATALDO,

Plaintiffs,

-against-

Civil Action
No. 74 C 1774

DAVID A. LAND, T. GORMAN REILLY,
and ROBERT E. LEVINE,

Defendants.

- - - - -x

TO THE JUDGES OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK:

The Petition of DAVID P. LAND and T. GORMAN REILLY, Assistant United States Attorneys for the Southern District of New York, and ROBERT E. LEVINE, an Internal Revenue Agent, employed by the Internal Revenue Service of the United States of America, by their attorney, DAVID G. TRAGER, United States Attorney for the Eastern District of New York, upon information and belief, respectfully shows:

1. On the 27th day of November, 1974, an action was commenced against petitioners, employees of agencies of the United States of America, in the Supreme Court of the State of New York, County of Queens, State of New York, entitled "Anthony B. Cataldo and Ada W. Cataldo, Plaintiffs, against David P. Land, T. Gorman Reilly, and Robert E.

Levine, Defendants," by service upon petitioner Levine of a summons and complaint, copies of which are annexed hereto.

2. The above-described action is a civil action which may be removed to this Court by petitioners, defendants therein, pursuant to the provisions of Title 28, United States Code, Section 1442, in that:

(a) The complaint in said action seeks judgment against defendants DAVID P. LAND and TO GORMAN REILLY for allegedly suborning perjury by conspiring with and inducing defendant ROBERT E. LEVINE to testify falsely under oath, during the course of a trial commenced by plaintiffs herein for the recovery of monies paid under protest to the Internal Revenue Service, and against defendant ROBERT E. LEVINE, for allegedly conspiring with defendants LAND and REILLY to defraud the court in said trial by testifying falsely, allegedly resulting in dismissal of said suit, to plaintiffs' injury;

(b) At all times referred to in plaintiffs' complaint, the defendants DAVID P. LAND and T. GORMAN REILLY were and now are agents of the United States Department of Justice in the capacities of Assistant United States Attorneys for the Southern District of New York, and defendant ROBERT E. LEVINE was and now is an agent of the Internal Revenue Service in the capacity of Internal Revenue Agent; and

(c) At all times mentioned in said complaint petitioners were acting solely under color of their respective offices and in the performance of their duties of said offices in that defendant DAVID P. LAND and T. GORMAN REILLY, as Assistant United States Attorneys for the Southern District of New York, were responsible for and conducted the defense of the United States in the suit and trial for the recovery of monies referred to in plaintiffs' complaint, and defendant ROBERT E. LEVINE, as Internal Revenue Agent for the Internal Revenue Service, was responsible for the audit of the records of plaintiff ANTHONY B. CATALDO, and all acts done by petitioners in connection with the matters set forth in plaintiffs' complaint were done by them in the performance of their duties as agents of their respective offices.

WHEREFORE, petitioners pray that the above action now pending against petitioners in the Supreme Court of the State of New York, County of Queens, State of New York, be removed therefrom as a separate civil action to this court.

Dated: Brooklyn, New York
December 16, 1974

DAVID G. TRAGER
United States Attorney

CIS:HAB:gp
F. 742342

SUPREME COURT : QUEENS COUNTY

----- X
ANTHONY B. CATALDO and
ADA W. CATALDO,

Civil Action
No. 74 C 174

Plaintiffs,

NOTICE OF
REMOVAL

-against-

DAVID P. LAND, T. GORMAN REILLY,
and ROBERT E. LEVINE,

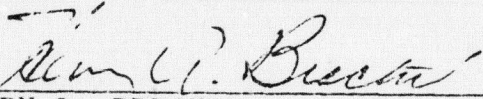
Defendants.
----- X

S I R S :

PLEASE TAKE NOTICE that DAVID P. LAND, T. GORMAN REILLY, and ROBERT E. LEVINE, the defendants above-named, by their attorney, DAVID G. TRAGER, United States Attorney for the Eastern District of New York, have today filed their Petition and Bond for Removal, copies of which are attached hereto in the office of the Clerk of the United States District Court for the Eastern District of New York, pursuant to Title 28, United States Code, Section 1442, effecting the removal of the above-entitled action from the Supreme Court of New York, County of Queens, State of New York.

Dated: Brooklyn, New York
December 16, 1974

DAVID G. TRAGER
United States Attorney
Eastern District of New York

By: 

HENRY A. BRACHTEL
Assistant U.S. Attorney
225 Cadman Plaza East
Brooklyn, New York 11201

TO:
Anthony B. Cataldo, Esq.
111 Broadway
New York, N.Y. 10006

COMPLAINT

SUPREME COURT: QUEENS COUNTY

ANTHONY B. CATALDO and ADA W. CATALDO,

Plaintiffs,

COMPLAINT

-against-

DAVID P. LAND, T. GORMAN REILLY, and ROBERT
E. LEVINE,

Defendants.

The plaintiffs by their attorney, ANTHONY B. CATALDO acting pro se for himself and as attorney for the co-plaintiff, complaining of the defendants allege as follows:

AS AND FOR A FIRST CAUSE OF ACTION
AGAINST DEFENDANTS, DAVID P. LAND
AND T. GORMAN REILLY.

FIRST: That plaintiffs are married and reside at Forest Hills, Queens, New York and plaintiff Anthony.B. Cataldo is an attorney-at-law duly admitted to practice law in the State of New York by an order of the Appellate Division, Second Department made the 14th day of June, 1934.

SECOND: That upon information and belief defendants David P. Land and T. Gorman Reilly are attorneys and counsellors-at-law.

THIRD: That in April 1964, plaintiffs duly filed

their Federal Income Tax Return for the year 1963, and sometime thereafter an assessment was issued by the Internal Revenue Service alleging that additional tax was due thereon amounting to \$2210.87 and demanded that that sum with interest of \$507.62 be paid.

FOURTH: That said assessment was arbitrary and capricious in that the Internal Revenue Service had intentionally and without reasonable cause therefor disallowed certain business expenses claimed by the plaintiff as deductible under the Internal Revenue Code and thereby unlawfully increased the taxable income and the alleged tax to be paid thereon.

FIFTH: That plaintiffs paid said sum of \$2718.49 under protest, they duly filed claim for refund and thereafter duly commenced a suit for the recovery of said sum in the United States District Court for the Southern District of New York.

SIXTH: That said plaintiffs' suit came on to be heard at a trial held before Hon. Richard H. Levet, without a jury, on the 10th, 11th and 14th days of May, 1973, with defendants David P. Land and T. Gorman Reilly appearing as attorneys for the defendant.

SEVENTH: That during the course of said trial said attorneys for the defendant suborned perjury by inducing defendant Robert E. Levine, an Internal Revenue agent, to testify falsely, under oath, that he had not seen an attorney's

diary of the plaintiff, Anthony B. Cataldo, but had seen yellow sheets of papers instead of the diary, fact statements which were not true, known to all defendants to be untrue and contrary to prior statements of said Robert E. Levine, made under oath, that he had seen the said diary and had made notes therefrom and that he had turned said notes over to the attorneys named co-defendants with him herein.

EIGHTH: That additionally to causing said Levine to commit perjury, and committing subornation of perjury as aforesaid, the defendants, David P. Land and T. Gorman Reilly, did willfully and with intent to deceive the court and these plaintiffs, offer to the court a list of expenses that were not disallowed by the assessment but which said defendants claimed were disallowed and they represented them to be at issue at the trial which was not so, and further, they advanced views of plain statutory provision, which were palpably and plainly false, and claimed facts as true and well proven which they knew to be untrue and unproven, all to mislead the court and to induce it to rely upon such false statements to reach a decision in favor of the defendant in reliance upon said representations, and thereby to cause damage to plaintiffs, and the court was thus misled to, and it did dismiss the action despite the fact that plaintiffs' suit was well founded and but for such unlawful and deceitful actions of said defendants, it would have ended in a decision awarding plaintiffs a recovery.

NINTH: That in so acting to deceive the court and these plaintiffs, said defendants Land and Reilly, acted in concert to conspire to defraud the court and these plaintiffs

by representing themselves as conscientious attorneys for the government, experts in their field and knowledgeable of the tax rules and regulations, and yet they advanced said untrue facts and theories of law to the court upon which the court did rely to the detriment of these plaintiffs, and the court and these plaintiffs, were deceived thereby.

TENTH: That plaintiffs have suffered damages amounting to the loss of the sum sought to be recovered in said suit, the costs taxed by the defendant, the fair and reasonable expenses and cost of prosecuting the said suit and the appeals following upon the entry of the judgment of dismissal amounting in all to the sum of \$10,000, and each of said defendants, Land and Reilly are liable to plaintiff's for punitive damages in a sum triple the amount of compensatory damages or the sum of thirty thousand dollars each.

AS AND FOR THE SECOND CAUSE OF ACTION
STATED AGAINST THE DEFENDANTS, DAVID
P. LAND, T. GORMAN REILLY AND ROBERT
E. LEVINE, PLAINTIFFS ALLEGE.

ELEVENTH: That plaintiffs repeat and re-interate each and every allegation of the foregoing paragraphs First through Tenth herein above stated.

TWELFTH: That said Robert E. Levine is an Internal Revenue Agent who had audited the records of the plaintiff, Anthony B. Cataldo, in checking the accuracy of the aforesaid tax return of the plaintiffs for the year 1963, and in the

course of said audit, plaintiff, Anthony B. Cataldo had turned over to said Levine all books and records of said plaintiffs business including a lawyer's diary which had been kept by him for the year 1963.

THIRTEENTH: That the said tax return was a correct and faithful report of the taxable income of the plaintiffs for said year 1963.

FOURTEENTH: That during the prosecution of the suit for the recovery of the money paid against the unlawful assessment of additional tax as aforesaid, plaintiffs sought to examine defendant before trial and in pursuance to an order entered by the court, defendant produced said Robert E. Levine as its witness and plaintiffs did depose said Levine as a witness under oath.

FIFTEENTH: That said defendant, Robert E. Levine, did testify before trial under oath and a transcript of his said examination was made and filed and in the course of said examination, the witness, Levine, identified the records and papers that were given him by plaintiffs for the purpose of auditing said return, and he identified the notes made by defendant's several agents of facts stated in said records and papers in making the assessment aforesaid, and, included among said records and papers were the diary aforesaid and his own notes that he had made from said plaintiff's diary.

SIXTEENTH: That in preparation for the trial, plaintiffs caused to be duly and properly served upon said Robert E. Levine two subpoenae: one requiring him to produce the books and records of the defendant including the notes of the lawyer's diary aforesaid, and the other requiring him to testify, and at the time of said service, all lawful fees were paid him.

SEVENTEENTH: That said Robert E. Levine did personally attend upon said trial; he took the stand at plaintiff's request; he was sworn to tell the truth; and he did then and there testify, but at variance to his testimony given at the time of his examination before trial in several material respects among them that he had not seen the said lawyer's diary for 1963, and in other respects as will be shown upon the trial of this action, and also, said Levine did not produce any writings or records described in the subpoena although said writings and records were demanded during the trial of the action.

EIGHTEENTH: That all three defendants had agreed among themselves that Levine would testify falsely on the trial as aforesaid; that they would not produce the books and records as commanded by said subpoena, and that such plan was designed to harm plaintiff by perpetrating a fraud upon the court and these plaintiffs thereby, and by obstructing justice by causing said court to rely upon the truth of the statements said defendants made but which were untrue, and were known by them to be untrue, and nevertheless, they intended that the

court should rely upon such statements, and the court did so rely upon them and it dismissed the suit to the hurt and detriment of the plaintiffs.

NINETEENTH: That in acting in concert as stated above, the defendants did engage and carry out a conspiracy to defraud and deceive plaintiffs who having received answers from defendant Levine on the examination before trial that were favorable and supportive of their complaint to the effect that the diary aforesaid had been received by said Levine on the audit of the return and that the said Levine had made notes and records of his audit of the books and records including the diary of the lawyer-taxpayer and had turned them over to defendants, T. Gorman Reilly and David P. Land, as trial counsel to the defendant, they relied upon such statements and set about to and did subpoena said Levine and his writings and records aforesaid, expecting that said Levine would again testify to the lawfulness of the deductions for expenses and other testimony favorable to them and that he would produce said records and documents which plaintiffs expected would corroborate plaintiffs' claims to the deductibility of the claimed expenses, that they did proceed to serve the subpoenae as aforesaid, but by reason of the conspiracy of said defendants and their implementation of it as aforesaid, the witness Levine with the connivance of his co-defendants did testify in a false and untrue manner in contradiction to his testimony under oath on the pre-trial deposition and he refused and failed to produce the records subpoenaed and

plaintiffs were prevented from making the proof of such facts and they were unable to and did fail to convince the trial court of the truth of the facts claimed by them.

TWENTIETH: That by reason of the premises aforesaid, plaintiffs have been damaged in the loss of a recovery in their suit and the cost and expense incurred in maintaining and prosecuting said suit and the appeals therefrom, amounting in all to the sum of \$10,000. and each of said defendants have rendered themselves liable for punitive damages to the plaintiffs for a sum three times the compensatory damages, making in all the sum of \$100,000., together with interest thereon and the costs and disbursements of this action.

WHEREFORE, plaintiffs demand judgment against defendants in the sum of \$100,000. together with interest on the compensatory damages from July 17, 1974 and the costs and disbursements of this action.

Yours, etc.,

ANTHONY B. CATALDO
Attorney pro se and for plaintiff
Office and P.O. Address
111 Broadway
New York, N.Y. 10006
(212) 962-0965

ANSWER

SAME CAPTION.

FIRST DEFENSE

1. The complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

2. All acts of defendants in connection with the litigation of an action entitled Anthony B. Cataldo, et ano. v. United States, U.S.D.C., S.C.N.Y., Index No. 69 Civ. 407, were done in defendants' respective official capacities as Assistant United States Attorneys (defendants LAND and REILLY) and as an Internal Revenue Agent (defendant LEVINE), and were acts within the scope and jurisdiction of defendants' respective offices, done in the execution in good faith of defendants' duties.

THIRD DEFENSE

3. Defendants admit the allegations contained in paragraphs SECOND, THIRD, FIFTH and SIXTH of the complaint; are without knowledge of information sufficient to form a belief as to the truth of the allegations contained in paragraph FIRST of the complaint; deny the allegations contained in paragraphs FOURTH, SEVENTH, EIGHTH, NINTH, TENTH, THIRTEENTH, EIGHTEENTH, NINETEENTH and TWENTIETH of the complaint; and repeat and reallege, in response to paragraph ELEVENTH of the complaint, the admissions and

denials of the allegations contained in paragraphs FIRST through TENTH of the complaint as set forth above.

4. Defendants deny the allegations contained in paragraph TWELFTH of the complaint except admit that defendant LEVINE is an Internal Revenue Agent who examined records of plaintiffs and prepared an Information Report for the Internal Revenue Service Appellate Conferee.

5. Defendants admit the allegations contained in paragraph FOURTEENTH of the complaint except deny that defendant LEVINE testified for the United State of America pursuant to an order of the court and allege that defendant LEVINE testified pursuant to a notice of deposition of the United State of America upon oral examination.

6. Defendants deny the allegations contained in paragraph FIFTEENTH of the complaint except admit that defendant LEVINE testified before trial under oath and that a transcript of said testimony was made and filed and refer to said transcript for the contents thereof.

7. Defendants deny the allegations contained in paragraph SIXTEENTH of the complaint except admit that defendant LEVINE was served with at least one trial subpoena and refer to the subpoena or subpoenas for their contents.

8. Defendants deny the allegations contained in paragraph SEVENTEENTH of the complaint except admit that defendant LEVINE testified as a witness under oath during

the trial and refer to the transcript of proceedings for the contents thereof.

WHEREFORE, defendants pray for judgment dismissing the complaint with costs to defendants and for such other and further relief as this Court shall deem just and proper.

Dated: Brooklyn, New York
March 26, 1975

DAVID TRAGER
United States Attorney

NOTICE OF MOTION TO STRIKE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
ANTHONY B. CATALDO and
ADA W. CATALDO,

Plaintiffs,

-against-

DAVID P. LAND, T. GORMAN REILLY
and ROBERT E. LEVINE,

Defendants.

NOTICE OF
MOTION

Civil Action
74 C 1774

-----X
S I R :

PLEASE TAKE NOTICE that the undersigned will move
this Honorable Court at a Stated Motion Part before Hon.
Jacob Meishler at the United States Court House at 225
Cadman Plaza, in the Borough of Brooklyn, City of New York,
on the 18th day of April, 1975, at 10:00 o'clock in the forenoon
thereof or as soon thereafter as counsel can be heard for
an order striking the appearance and the answer of the United
States Attorney heretofore filed in behalf of the defendants
herein, and for such other and further relief as this Court
may deem just and proper in the premises.

Dated: New York, N.Y.
April 3 , 1975

Yours, etc.,

TO:
HON. DAVID G. TRAGER
United States Attorney
Attorney for Defendants
U.S. Courthouse
225 Cadman Plaza East
Brooklyn, N.Y. 11201

ANTHONY B. CATALDO
Attorney for Plaintiffs and pro se
Office & P.O. Address
111 Broadway
New York, N.Y. 10006
962-0965

AFFIDAVIT OF ANTHONY B. CATALDO IN SUPPORT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x
ANTHONY B. CATALDO and
ADA W. CATALDO,

Plaintiffs,

-against-

DAVID P. LAND, T. GORMAN REILLY
and ROBERT E. LEVINE,

Defendants.

AFFIDAVIT

Civil Action
74 C 1774

-----x
STATE OF NEW YORK)
 :
COUNTY OF NEW YORK)

ANTHONY B. CATALDO, being duly sworn, deposes and says that he is one of the plaintiffs in this action. He is an attorney at law appearing pro se. He makes this application for an order striking the appearance of the United States Attorney herein, for his lack of authority or duty to appear for the defendants in a personal suit against them.

This suit is against the three defendants for deceit and fraud upon the court and plaintiffs within an action prosecuted by plaintiffs to recover monies unlawfully collected upon an arbitrary and capricious assessment for income taxes. The defendants did conspire to and did commit perjury in violation of 28 U.S.C. 1621, within said action, and further did criminally obstruct the administration of justice as in 28 U.S.C. 1503 mentioned. The facts appear on the face of the complaint. These actions do not fall within the scope of

defendants' duties in their respective capacities as government employees. When they engage themselves in such criminal acts, they automatically step out of their garb as public employees into personal garb. They were and are forbidden by law to engage in such criminal activity and they are, moreover, violating the conditions imposed upon them by rules and regulation on the manner of the performance of their duties as prescribed for their respective positions. Consequently, they were not and could not be said that while thus criminally engaged, that they were performing work for their employer. They were transgressing the rules laid down for the execution of their duties, and disregarding the very positive commands of the law. It is not for plaintiffs to say whether at the time of their engaging in the criminal conduct stated, what their purposes and motives were. Certainly, it is not the purpose and motive of the government to violate the very laws it imposes upon the public and its employees to observe.

The United States attorney and his assistants are likewise public employees. They are required by rules and regulations to conduct the duties for which they were employed in manner loyal to the government, observing the laws laid down by the government. The duties of such attorneys stem from the statutory grant of powers to the Attorney General in 28 U.S.C. 457 where subdivision 3 states that he should "prosecute or defend, for the Government, all civil actions, suits or proceedings in which the United States is concerned." The

government is in no way concerned in this suit against the three individual defendants named. This suit plainly is not against the government and seeks no redress from the government. Damages are sought only against the individuals whose unofficial acts caused the damage to plaintiffs. The United States Attorney must acknowledge this to be so. The complaint clearly so states. Nor is there a public interest involved in this suit. It is the ordinary suit between private parties over the invasion of private rights. Hence, the United States Attorney has no official sanction for using his office to enter into this litigation. Not only is the United States Attorney acting in excess of his authority in providing counsel to these defendants, but he is frustrating his position. It is his duty to prosecute criminal conduct not defend one charged with a criminal act.

Here there is a blatant attempt by the United States Attorney to defend three individuals charged with serious crimes against the United States and plaintiffs. It is apocryphal and it should be recognized as such by this honorable Court. While this action is in the context of a civil suit seeking damages, that fact does not alter the nature of defendant's action. Rather than defend such suit, it is his sworn duty to prosecute the defendants. Nor does the fact that they are employees of the United States and committed their crimes while performing duties, alter the criminal character of their action. It may be that the United States

(not the Attorney General or his delegate) has assumed the responsibility of the defense of their case and of paying the damages that may be recovered herein. If that is the case, the United States Attorney has not proven that he has been so authorized to appear; but as an incident of his employment by the United States he is not authorized to enter an appearance herein.

WHEREFORE, it is respectfully prayed that the appearance and answer filed by him in this case be stricken.

ANTHONY E. CATALDO

Sworn to before me this
1st day of April, 1975.

ANTHONY E. CATALDO
Notary Public in and for New York
State
County of New York
City of New York
76

AFFIDAVIT OF ANTHONY B. CATALDO IN REPLY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x
ANTHONY B. CATALDO and
ADA CATALDO,

Plaintiffs,

-against-

DAVID P. LAND, T. GORMAN REILLY
and ROBERT E. LEVINE,

Defendants.
-----x

Civil Action
No. 74 C 1774

REPLY AFFIDAVIT

STATE OF NEW YORK)
)SS:
COUNTY OF NEW YORK)

ANTHONY B. CATALDO being duly sworn deposes and says that he is one of the plaintiffs in this action. He makes this affidavit to clarify some of the allegations of the complaint to support plaintiff's claim of criminal conduct on the part of the defendants.

It is necessary to state the parts played by the defendants on the trial of a tax refund suit by plaintiffs against the United States. Defendants Land and Reilly are assistant United States attorneys who tried the case. The defendant Levine was an Internal Revenue agent who had audited plaintiffs books and testified in the case. Among the books and records said Levine audited were a diary and some 18 sheets of foolscap paper used to make out the return. Involved was income taxes

for 1963. Plaintiff's husband is a lawyer and what had caused the alleged deficiency was an alleged disallowance of deductions claimed as business expense.

A lawyers diary was kept by the husband in which petty cash expenses were noted for the year on the date incurred. It also contained his usual daily activity for clients.

All other expenses were paid by checks and the paid checks and notations on the check stubs were also turned over to Levine.

Levine was appointed by defendant to be deposed on a pre-trial examination by plaintiffs. He was sworn to tell the truth and testified, for one thing, that he had received for his audit, plaintiff's check-book, checks, the lawyer's diary and some miscellaneous papers, etc. At p. 21, line 3 of his deposition Mr. Levine was asked "Were diaries shown you as well on this examination". Mr. Levine said, "Yes, Sir". And at line 19, Mr. Levine was asked, "Would you say that you had a complete examination, that you made a complete examination of the tax payers return for 1963". His answer was, "Yes, Sir".

Then on the trial starting at page 263 of the minutes, on examination by Mr. Reilly, Mr. Levine testified.

"Mr. Reilly: Mr. Levine, I am showing you
29 for identification. Plaintiff's Exhibit

29 for identification. Is that labelled
Diary at the top?

A. It says diary; yes sir.

* * *

Mr. Reilly: * * * Is that legal cap
paper you have before you, 29 for
identification?

A. * * * The nature of the taxpayer's
reporting his expenses was by re-
cording amounts on yellow cap paper,
a separate page being available with
a heading for that category of ex-
penses. One of the categories of
expenses was petty cash, which re-
sembled this schedule.

* * *

Mr. Cataldo: Q. All right. Isn't
there a difference between a yellow
cap and a diary in your mind.

A. Yes sir there is.

Q. All right. When
you are talking about a diary, you
mean a diary, don't you, ordinarily.

A. Yes sir.

Q. You can't confuse a
diary with a foolscap paper. Can you?

The court: That's a nonsensical question. Don't answer it.

* * *

by Mr. Reilly: I am showing you again page 21 of the deposition, The question was, "Were diaries shown to you." Did you understand that question to refer to Mr. Cataldo's lawyer's diary for

* * *

A. My answer was in respect of an understanding that it was the yellow cap paper."

Again reverting to the deposition of Mr. Levine at page 111, Mr. Levine testified upon questioning by Mr. Reilly as follows:

" by Mr. Reilly: Q. Did Mr. Cataldo show you a lawyers diary for the year 1963 in connection with certain business expenses.

A. Yes.

Q. Were you allowed to retain it?

A. No sir.

Q. Was that taken back from you?

A. It was never- it was part of his books and records, not intended to be taken by me, although I did extract

tapes of the total diary expenses indicated."

What happened was that plaintiff had lost his diary between the time Mr. Levine was deposed before trial and the time he testified at the trial. That fact became known to the assistant United States attorney before trial. At trial, he sought to put in issue, without amendment of pleadings, the deductibility of many expenses that had been allowed by the deficiency letter, among which were the petty cash items listed in the diary.

At the time of making the return in 1964 the plaintiff had transposed his expense items as they appeared in his records, to yellow sheets of paper. There were 18 sheets altogether, five of which reflected the items in the diary and these five were headed "diary". There were no specifications for what the items were, only the amounts were shown.

For the trial, Levine had been served by plaintiff with a subpoena. He was sitting in the court room where he was called by the court to testify about the petty cash items in the diary. Upon his intimating that he might not have seen a diary, plaintiff asked for a recess during which he could search the deposition for Levine's testimony earlier that he had seen the diary.

While deponent was searching the deposition, Mr. Reilly asked for Exhibit 29 for identification which were the five yellow sheets referred to above. Messrs. Reilly, Land and Levine went into a huddle in a corner of the courtroom where plaintiff had a clear view of them and they discussed the five yellow sheets of paper. When the trial was resumed the foregoing testimony was given denying that the diary had been turned over to Levine. Thereby, they could refuse to turn over the tapes Levine had taken from the diary as testified on the deposition. In fact, later, plaintiff called for the tapes but Mr. Reilly refused to produce them and the court sustained such refusal.

It must be observed, at this point, that Mr. Reilly himself had seen the diary when he examined deponent's books. The diary was shown to him but deponent had refused to have him read it without a court order. It was explained that clients' matters were noted in the diary and that, at the least, deponent should have a court order to protect him if the diary was to be read by defendant's counsel. Accordingly, Mr. Reilly had personal knowledge of the existence of the diary. The above excerpt from page 111 of the deposition corroborates the existence of the diary and that it was in truth shown to Levine. Besides committing perjury and subordination of perjury, plaintiffs

charge defendants with obstruction of justice. Not only was the perjury planned to deceive the court and hurt the plaintiff but also the two attorneys advanced other false facts for the same purpose to the court. A few illustrations are:

a. They denied at the trial that two items of disallowances amounting to \$1084.57 and \$2282.58 did not refer to specific expenses but were sums taken by subtracting one group of expenses from another group. As it was not possible to know just what item of expense had thus been disallowed, the deficiency based upon such deductions was arbitrary. These latter facts were testified to by Levine on the deposition but he refused to say the same thing on the trial and, instead, Levine stated that the deficiency, including these two figures, were properly determined.

b. Many expenses that were allowed by the auditors were listed in a schedule of disallowed expenses made up unilaterally by defense counsel as being in issue for trial. The truth was that most of the expenses disallowed by the deficiency notice were admitted to have been deductible in pre-trial proceedings. Wanting to put plaintiff to the proof of his other expenses, the listed figures were arbitrarily advanced as being in issue. Only those items listed in the deficiency that were in dispute were the only issues properly before the court. The

deception was successful because the court failed to acknowledge and give effect to defendants' failure to amend its pleading to include almost \$9000 of claimed expenses not included in the deficiency letter. Defense counsel claimed that plaintiffs have the burden of proof, even on the items that had already been allowed by the deficiency, and regarding what had been formally admitted in the litigation by defendant to be deductible. The judge adopted such false rules of the burden of proof.

Further, the defense lawyers offered explanations of the law relating to the burden of proof of business expense which were false. They claimed that ordinary business expenses fell within the strictures of Section 274. They had to be proven by writings despite the fact that they were petty cash expense for supplies, ordinary business lunches and other expense, such as, dues for Chamber of Commerce Membership and expenses incurred at their functions and expense at a Maritime Law function had to be proven by writings, they said. These arguments were advanced because the lawyers knew that though untrue they would be accepted by Judge Levet, and Judge Levet did accept them to the detriment of the plaintiff. At trial deponent will cull out these false claims to facts and law which were improperly advanced to the court, in detail.

As perjury, subordination of perjury, and obstruction of justice are criminal acts, the complaint is well justified and by the same token, they compel the conclusion that the United States Attorneys exceeded their power of office. The Attorney General for the United States, and hence, the United States Attorney is impowered to prosecute crimes, not defend them if committed by a fellow United States Attorney. Besides, this suit is brought against the individuals and not against the United States. The latter has no interest, unless it agrees to pay the judgment if one is recovered. If such an agreement is lawfully made plaintiff will withdraw this motion.

Also criminal acts having been clearly shown, there can be no claim that to defend these defendants, would be in the public interest. The public interest would be better served if these defendants were compelled to finance this litigation which was induced by their ugly actions. Their actions are way beyond their duty. The regulations of the Department of Justice required them to proceed within the Canons of Ethics and ethical and good conduct is prescribed for them. Having breached their duties, they should not be permitted to have counsel at taxpayer's expense. If they have any defense let them pay for it. They caused it, not the Government.

WHEREFORE it is respectfully submitted that this motion should be granted.

Sworn to before me this
7th day of May, 1975

Anthony B. Catalano

MARY TIERNEY
Notary Public, State of New York
No. 41-4601901
Qualified in Queens County
Commission Expires March 30, 1976

AFFIDAVIT OF HENRY A. BRACHTL
IN OPPOSITION

SAME CAPTION.

HENRY A. BRACHTL, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney for the Eastern District of New York, of counsel to defendants in the above action, and I make this affidavit in opposition to plaintiffs' motion to strike defendants' answer and to preclude representation of defendants by the United States Attorney.

2. By memorandum dated March 28, 1975, the Attorney General of the United States, by his delegate, the Acting Assistant Attorney General, Civil Division, Department of Justice, confirmed earlier oral authorization to David G. Trager, United States Attorney, Eastern District of New York, to represent the defendants Robert Levine, an employee of the Internal Revenue Service, and Assistant United States Attorneys David P. Land and T. Gorman Reilly in this action.

3. For the information of the Court and to refute plaintiffs' contention that the appearance of the United States Attorney as counsel for defendants in this action is unauthorized, a copy of that memorandum is attached to this affidavit.

HENRY A. BRACHTL

UNITED STATES GOVERNMENT

Memorandum

TO : United States Attorney
Brooklyn, New York

FROM : Irving Jaffe
Acting Assistant Attorney General
Civil Division

SUBJECT: By: *[Signature]* Harland F. Leathers, Chief
General Litigation Section

74234Y
Bozak

DATE: March 28, 1975

VBTerlep:dpb
145-12-2275

Tel: 202-739-4259

Anthony B. Cataldo, et al. v. David P. Land,
et al., U.S.D.C., E.D.N.Y., Civil No. 74 C 1774

This is to confirm the telephone conversation between Vincent B. Terlep, Jr., of this office and Mr. Bracht1 of your office confirming your authorization to represent Robert Levine, an employee of the Internal Revenue Service and Assistant U. S. Attorneys David P. Land and T. Gorman Reilly in this action.

-32a-



5010-110

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

DECISION DENYING MOTION TO STRIKE
APPEARANCE OF UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

74 C 1774

ANTHONY B. CATALDO and ADA
W. CATALDO,

Plaintiffs,

-against-

Memorandum of Decision
and Order

DAVID P. LAND, T. GORMAN REILLY
and ROBERT E. LEVINE,

Defendants.

July 1, 1975

MISHLER, CH. J.

Plaintiffs instituted this action in Supreme Court, Queens County, accusing the defendant Robert Levine, an Internal Revenue Service agent, of committing perjury in a suit brought by the plaintiffs in the United States District Court for the Southern District of New York to recover a sum paid to the Internal Revenue Service as an additional tax assessment. The complaint also alleges that the defendants, Land and Reilly, Assistant United States Attorneys, who defended the action in the Southern District, suborned the perjury by Levine and committed acts of fraud on the court. The Queens County action was removed to this court, pursuant to 28 U.S.C. §1442, by the United States Attorney for the

Eastern District of New York, who also interposed an answer on behalf of the defendants. Plaintiffs now move to strike the appearance by the United States Attorney and the answer filed by him. The motion is based on the argument that these defendants are being sued in their individual capacity for wrongful acts committed outside the scope of their employment.

Motions of this type have been infrequently dealt with by the federal courts; most courts which have reached the question have summarily stated that the disputed representation of federal officers by a United States attorney was proper. See, e.g., United States v. Winscott, 238 F.2d 519, 520 (7th Cir. 1956); King v. Hildebrandt, 216 F. Supp. 814, 817 (S.D.N.Y. 1963), aff'd, 331 F.2d 476, 478 (2d Cir. 1964). A slightly more extensive statement of the principle can be found in Konigsberg v. Hunter, 308 F. Supp. 1361 (W.D. Mo. 1970). Plaintiff in that case sued a district court judge, two Assistant United States Attorneys, and various correction officers and Bureau of Prisons officials, alleging a series of wrongful acts which constituted a malicious conspiracy to deprive the plaintiff of his constitutional rights. The court denied plaintiff's motion which would have required the defendants to obtain their own counsel saying (308 F. Supp. at

1363): "It is the duty of the United States Attorney to represent federal officials in suits arising out of their employment, and this suit did so arise, without question."

Statutory authority for the United States Attorney's representation of the federal officers in this case may be found in 28 U.S.C. §547. The statute directs that the "United States Attorney . . . shall — (2) prosecute or defend, for the Government, all civil actions, suits or proceedings in which the United States is concerned." In addition, there was direct authority from the Department of Justice to the United States Attorney to represent the defendants in this case. The authorization is contained in a letter dated March 28, 1975, from the Chief of the General Litigation Section of the Civil Division of the Department of Justice. (See affidavit in Opposition of Henry A. Bracht1 dated April 15, 1975.)

Plaintiffs argue that all of this authorization is, in effect, irrelevant because the defendants were engaged in criminal activity outside the scope of their employment and because, therefore, the United States could have no interest in the suit. However, contrary to the position take by the plaintiffs, it has not been proven that the defendants engaged

in any criminal activities. There are only the allegations of the plaintiffs as to the defendants' wrongful acts; no court or jury has ever found the defendants guilty of the alleged criminal activities. Furthermore, the suit clearly does arise out of their employment. But for their respective positions as Assistant United States Attorneys and Internal Revenue Service Agent, defendants would not have been involved in plaintiffs' original suit in the Southern District. It has not been conclusively shown, beyond plaintiffs' bare allegations, that defendants' conduct in that action was, by its nature, outside the scope of their employment. In any case, the United States certainly does have an interest in defending a civil suit in which allegations of wrongdoing are made against federal employees.

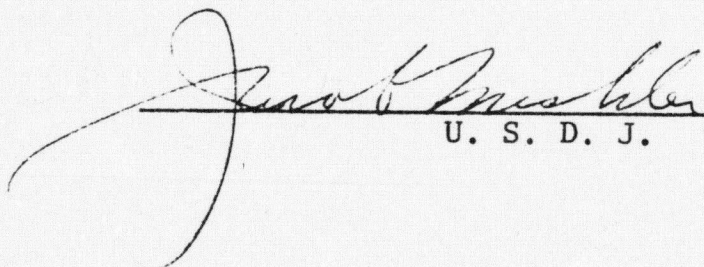
Defendants cite several cases in which representation by a United States attorney has been accorded to judges charged by plaintiffs with various acts of wrongdoing. See Weiss v. Bonsal, 344 F.2d 430 (2d Cir. 1965); Meredith v. Van Oosterhout, 286 F.2d 216 (8th Cir. 1960), cert. denied, 365 U.S. 835, 81 S.Ct. 749 (1961); Booth v. Fletcher, 101 F.2d 676 (D.C. Cir. 1938), cert. denied, 59 S.Ct. 835 (1939). Plaintiffs argue that these cases are as irrelevant as were

the statutory and decisional authorities previously discussed. Plaintiffs find these particular cases inapposite because the judges in question were not acting criminally, but rather were engaged in their official duties. Yet, in Booth, for example, the defendant judges were alleged by the plaintiff to have conspired with other judicial officials to wrongfully disbar plaintiff from the practice of law. From the point of view of that plaintiff, the alleged wrongful acts were just as far beyond the scope of employment or official duty as are the acts complained of by the plaintiffs here. In fact, it is the cases cited by the plaintiffs which are inapposite. Cases such as Hilliard v. Williams, 465 F.2d 1212 (6th Cir. 1972) and Lewis v. Brautigam, 227 F.2d 124 (5th Cir. 1955) deal primarily with the question of immunity not representation. These are cases in which government officials have not been permitted, because of the criminal nature of their conduct, to claim immunity from civil suits arising out of their employment. No claim of immunity has yet been raised by the defendants in this action, and if such a claim were made, it would present an entirely different issue.

The plaintiffs have been unable to overcome the

weight of authority, both statutory and decisional, which makes proper the representation by the United States Attorney of the defendants in this case. Accordingly, plaintiffs' motion for an order striking the appearance and the answer filed by the United States Attorney on behalf of the defendants is denied and it is

SO ORDERED.



U. S. D. J.

NOTICE OF MOTION
TO DISMISS COMPLAINT

SAME CAPTION.

PLEASE TAKE NOTICE that the defendants, by their undersigned attorney, will move this Court before the Honorable Jacob S. Mishler, Chief Judge, at the United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York, in Courtroom 5, on the 1st day of April, 1977, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order pursuant to Rule 12(c) of the Federal Rules of Civil Procedure granting judgment on the pleadings dismissing plaintiffs' complaint for failure to state a claim upon which relief can be granted or, in the alternative, for an order pursuant to Rule 56(b) of the Federal Rules of Civil Procedure, granting defendants summary judgment dismissing plaintiffs' complaint and granting such other and further relief as this court deems just and proper.

Submitted herewith in support of this motion are the following materials:

- (a) Statement pursuant to Rule 9(g) of the General Rules of this Court.
- (b) Memorandum of Law in support of this motion, together with Exhibits (in a separate binder) marked "A" through "J."
- (c) Affidavits of defendants Land, Reilly and Levine.

Dated: Brooklyn, New York
March 22, 1977

Yours,
DAVID G. TRAGER
United States Attorney

DEFENDANTS' STATEMENT OF MATERIAL FACTS
NOT IN DISPUTE PURSUANT TO RULE 9(g)

SAME CAPTION.

The defendants state that the following are the material facts as to which there is no genuine issue to be tried:

1. Plaintiffs commenced a tax refund action against the United State of America (seeking a refund for the year 1963) in the United States District Court for the Southern District of New York, on January 31, 1969, styled Anthony B. Cataldo and Ada W. Cataldo v. United State of America, 69 Civ. 407 (S.D.N.Y.).

2. Plaintiffs' tax refund action was tried before the Hon. Richard Levet on May 10, 11, and 14, 1973. (A certified copy of the trial transcript is attached as Exhibit "A" to defendants' memorandum of law).

3. In an "Opinion, Finding of Fact and Conclusions of Law," dated June 29, 1973, the District Court granted judgment to the United States of America dismissing plaintiffs' tax refund action with prejudice. The Court concluded that, "Plaintiffs are not entitled to a tax refund for the year 1963."

4. Judgment dismissing plaintiffs' tax refund action was entered on July 17, 1973.

5. Plaintiffs appealed the District Court decision to the United States Court of Appeals for the Second Circuit, Docket No. 73-2602.

6. In a per curiam decision dated June 25, 1974, and reported at 501 F. 2d 396 (2d Cir. 1974), the District Court decision was affirmed on the merits. The Court of Appeals concluded that " . . . appellants were afforded a fair trial and that the District Court did not err in finding for the Government." 501 F. 2d at 396.

7. T. Gorman Reilly and David P. Land were the Assistant United States Attorneys who conducted the defense of the United States in plaintiffs' tax refund lawsuit.

8. Robert Levine was a Revenue Agent who participated in the audit which resulted in the assessment for 1973 which plaintiffs sought to challenge in their tax refund lawsuit.

9. The alleged acts of wrongdoing of which plaintiffs complain relate to actions taken by the defendants in the course of plaintiffs' tax refund lawsuit, 69 Civ. 407 (S.D.N.Y.).

10. Each of the allegations of wrongdoing which plaintiffs have raised in this lawsuit, i.e., misrepresenting the law and the facts, perjury, subornation of perjury, and disregarding a subpoena duces tecum (referred to in the aggregate by plaintiffs as "fraud on the court") was raised by plaintiffs in their tax refund lawsuit, 69 Civ. 407 (S.D.N.Y.), Docket No. 73-2602 (C.A. 2d).

11. Defendants Land and Reilly did not misrepresent the law or facts, did not wrongfully disregard a subpoena

duces tecum, and did not advise, instruct or encourage defendant Levine to testify other than in an honest and forthright manner.

12. Defendants Land and REilly were acting within the scope of their official duties as Assistant United States Attorneys and with a good faith belief in the necessity and reasonableness of their actions at all times relevant to plaintiffs' complaint.

13. Defendant Levine testified at the trial of plaintiffs' tax refund action in a manner in which he thought was truthful and fully responsive to the questions posed. He did not wrongfully disregard a subpoena duces tecum.

14. Defendant Levine acted within the scope of his official duties in testifying as to information acquired in the course of an official audit of plaintiffs' tax returns and he had a good faith belief in the necessity and reasonableness of all his actions.

15. The certified transcript of the trial of plaintiffs' tax refund action (Exhibit "A" to defendants' memorandum of law) sets forth the facts and circumstances relevant to the actions taken by defendants which have given rise to this lawsuit. The transcript established unequivocally that the defendants' actions were proper, necessary and reasonable.

16. Plaintiffs had their day in court and had an opportunity to be heard (both in the Southern District of

New York and the Second Circuit Court of Appeals) in their tax refund action with respect to each of the allegations of wrongdoing now asserted as the basis of their claim for damages against the individual defendants.

Dated: Brooklyn, New York
March 22, 1977

DAVID G. TRAGER
United States Attorney

AFFIDAVIT OF T. GORMAN REILLY, IN
SUPPORT OF MOTION TO DISMISS

SAME CAPTION.

I, T. GORMAN REILLY, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney on the staff of ROBERT E. FISKE, JR., United States Attorney for the Southern District of New York.

2. In my capacity as an Assistant United States Attorney, I was jointly responsible with DAVID P. LAND, formerly an Assistant United States Attorney in the Southern District of New York, for the defense of the UNITED STATES OF AMERICA in a civil tax refund lawsuit commenced in the United States District Court for the Southern District of New York on January 31, 1969, by ANTHONY B. CATALDO and ADA W. CATALDO, Civil Action No. 69 Civ. 407.

3. Following extensive pre-trial discovery, that lawsuit was tried before the Honorable Richard H. Levet on May 10, May 11 and May 14, 1973. Judgment was thereafter entered for the Government.

4. Consistent with my obligations as attorney for the defendant UNITED STATES OF AMERICA, I had occasion during the course of that trial to advance to the Court various theories of law, to make assertions of fact, to confer with ROBERT LEVINE, a Revenue Agent employed by the Internal Revenue Service, and to interpose objections to certain of the questions and assertions of plaintiff pro se ANTHONY B. CATALDO.

5. Neither during the course of said trial nor at any other times relevant to plaintiffs' complaint did I advance to the Court any theories of law or statements of fact which I thought to be incorrect or untrue. At no time did I ever advise, instruct or encourage Mr. Levine not to tell the truth or to act other than in an honest and forthright manner in testifying before the Court.

6.0 At all times relevant to the plaintiff's complaint I was acting within the scope of my duties as an Assistant United States Attorney and consistent with my ethical obligations as a member of the bar. I had a good faith belief in the necessity and reasonableness of all of my actions. I do not believe that I, or any of the other defendants, have acted in any manner inconsistent with our official duties and ethical responsibilities.

Dated: New York, New York
August 13, 1976

T. GORMAN REILLY

AFFIDAVIT OF DAVID P. LAND IN
SUPPORT OF MOTION TO DISMISS

SAME CAPTION.

I, DAVID P. LAND, being duly sworn, depose and say:

1. I was formerly an Assistant United States Attorney on the staff of Whitney North Seymour, Jr., and Paul J. Curran, formerly the United States Attorneys for the Southern District of New York.

2. In my capacity as an Assistant United States Attorney and as Chief of the Tax Unit (having become Chief on or about June 1, 1973), I was jointly responsible with T. Gordon Reilly, an Assistant United States Attorney in the Southern District of New York, for the defense of the UNITED STATES OF AMERICA in a civil tax refund lawsuit commenced in the United States District Court for the Southern District of New York, on January 31, 1969, by Anthony B. Cataldo and Ada W. Cataldo, Civil Action No. 69 Civ. 407.

3. That tax refund lawsuit was tried before the Honorable Richard H. Levet on May 10, May 11 and May 14, 1973. Judgment was thereafter entered for the Government on the merits. Plaintiff Cataldo thereafter appealed the judgment, and the judgment was affirmed by the Second Circuit on the merits, Cataldo v. United States, 501 F. 2d 396 (2nd Cir., 1974).

4. Consistent with my obligations as attorney for the defendant UNITED STATES OF AMERICA, I had occasion during

the course of that trial and in post-trial briefs to advance, to the Court various theories of law, to make statements of fact and to interpose objections to certain of the assertions of plaintiff pro se Anthony B. Cataldo.

5. Neither during the course of said trial nor at any other times relevant to plaintiffs' complaint did I advance to the Court any theories of law or statements of fact which I thought to be incorrect or untrue. At no time did I ever advise, instruct or encourage Robert Levine, a Revenue Agent employed by the Internal Revenue Service, not to tell the truth or to act other than in an honest and forthright manner in testifying before the Court.

6. Agent Levine was called as a witness by Mr. Cataldo during his tax refund action. Prior to the time Agent Levine was called to the witness stand, I had never met him nor conferred with him as to any matter. As he proceeded to take the witness stand, I introduced myself to him and he introduced himself to me and we had no further conversation. After Cataldo commenced his action against me, Reilly and Levine, I conferred with Levine with respect to his testimony in the tax refund trial; and I have no reason to believe that Agent Levine testified other than honestly and forthrightly.

7. At all times relevant to the plaintiffs' complaint I was acting within the scope of my duties as an Assistant

United States Attorney and consistent with my ethical obligations as a member of the bar. I had a good faith belief in the necessity and reasonableness of all of my actions. I do not believe that I, or any of the other defendants, have acted in any manner inconsistent with our official duties and ethical responsibilities.

Dated: New York, New York
March 3, 1977.

DAVID P. LAND

AFFIDAVIT OF ROBERT LEVINE IN
SUPPORT OF MOTION TO DISMISS

SAME CAPTION.

I, ROBERT LEVINE, being duly sworn, depose and say:

1. I am employed as a Revenue Agent for the Internal Revenue Service, Department of the Treasury, United States of America.

2. In my capacity as a Revenue Agent I participated in a tax examination of the joint tax return of Anthony B. Cataldo and Ada W. Cataldo for the calendar year 1963. As a result of this examination a tax deficiency assessment in the amount of \$2,210.87 plus interest was made against said taxpayers.

3. Anthony B. Cataldo and Ada W. Cataldo subsequently challenged the assessment by commencing a civil tax refund lawsuit against the United States of America in the United States District Court for the Southern District of New York on January 31, 1969, Civil Action No. 69 C 407

4. That lawsuit was tried before the Honorable Richard H. Levet on May 10, May 11 and May 14, 1973. Judgment was thereafter entered for the Government on the merits.

5. I testified at the trial of plaintiff's lawsuit in connection with my participation in the investigation which resulted in the assessment; I was called as a witness by Anthony Cataldo.

6. At no time did I ever testify in a manner which I thought to be untrue or incorrect. At no time was I ever advised, instructed or encouraged not to tell the truth or to act other than in an honest and forthright manner in testifying before the court.

7. At all time relevant to plaintiffs' complaint I was acting within the scope of my duties as a Revenue Agent. I had a good faith belief in the necessity and reasonableness of all of my actions. I do not believe that I, or any of the other defendants, have acted in any manner inconsistent with our official duties and responsibilities as officers of the United States of America.

Dated: Brooklyn, New York
March 4, 1977

ROBERT LEVINE

AFFIDAVIT OF ANTHONY B. CATALDO IN SUPPORT OF
GROSS-MOTION AND IN OPPOSITION TO DEFENDANT'S MOTION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ANTHONY B. CATALDO and
ADA CATALDO.

Plaintiffs,

No. 74 C 1774

-against-

DAVID P. LAND, T. GORMAN REILLY
and ROBERT E. LEVINE.

Defendants.

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

ANTHONY B. CATALDO, being duly sworn, deposes and says that he is one of the plaintiffs in this suit. He is familiar with all the facts and proceedings heretofore had and he is competent to state the facts of this matter in support of plaintiffs' cross-motion for summary judgment and in opposition to defendants' motion for summary judgment.

This suit was brought to recover the damages suffered by plaintiffs by the actions of the defendants in obstructing justice in a case where plaintiffs were suing to recover a sum of money paid by them upon an unlawful arbitrary and capricious assessment of additional income tax for the year 1963. The defendants Land and Reilly are Assistant United States Attorneys and defendant Levine is an Internal Revenue Agent who had audited the books of the plaintiffs in respect of their return for 1963. Plaintiffs brought their suit for refund in the

Southern District Court of New York. The trial court dismissed the complaint and held deponent for contempt of court by separate decisions. Both decisions were induced by the unlawful actions of these defendants, wilfully and deliberately carried out with the intent of obstructing justice and causing, as will be hereinafter shown, the court's dismissal of the complaint instead of awarding the return of an overpayment of taxes as was proven or offered to be proven by plaintiffs.^{All of which} followed from such unlawful action of the defendants.

The defendants talked on many occasions with Mr. Madden, secretary to the trial Judge, the Hon. Richard J. Levat, stating that plaintiffs had hidden assets, and was not reporting income in full and was claiming unlawful deductions under the guise of business expense in the manner generally ascribed to members of the Mafia gangs. They caused Judge Levat during a conference in chambers, to inquire of deponent whether he was in the habit of losing documentary proof of importance and material to the issues. At another occasion, Judge Levat asked whether deponent had other moneys stashed away, and whether a missing diary had "disappeared". These defendants so influenced the trial judge with unjust accusations and false facts, that the trial justice insisted on deponent following a mode of introducing evidence suggested by defendants that resulted in a failure to prove the background and context in which the plaintiff had acted and so the procedure suggested by defendants made the evidence such as was allowed, meaningless. The mode of trial was one that was presented to Judge Levat, as a means of getting down to the issue.

Instead, they distorted the issues. Decisions were made based on the distorted facts. Sometimes the decisions were prompted by Mr. Madden. Under consideration were whether certain items were business expenses deductible from gross earnings in the operation of plaintiff's law office.

Yet, the deductions were in most cases amounts spent for clients in the prosecution of their cases such as a sum of \$667. to the National Surety Corp. and some \$300. to a court reporter for stenographic minutes or, other items paid to a stenographer working for deponent. Also, the dues to a chamber of commerce and tickets purchased for two affairs run by that organization were disallowed. Also, the advance of \$100. to pay a client's debt into court, in late December, 1963, which was reimbursed in 1964 and that sum of \$100. was reported as income in 1964; that all expenditures at the Bankers Club which were obviously for business luncheons were disallowed at the request of the defendants without any evidence in support of their claim that the expenditures were personal; the disallowance of interest charges incurred on loans procured by deponent to meet his office expense were disallowed at defendants' request without proof that the interest was personal expenditures. There are a great many other examples of how these defendants pressed upon the court the unlawful idea that if no record was made of the expenditure stating their business purposes that they were personal expenditures. The law requires only that the expenditures be reasonable and necessary to qualify as business expenses. There were records of the amounts paid and records of who received the money and in

many cases there were no notations on the checks of what the item was for. Yet, defendant claimed that the immediate purpose of the expenditure had to be shown by record, and no ledger record was kept by taxpayer. He had a record of his checks and deposits and supplemented them wherever necessary to show whether they were for a business purpose or not.

Defendants even advanced the idea that an item of expense was business depending upon an objective measure showing a specific business need and not as deponent claimed upon a showing of a reasonable connection between the type of expense and a business relation. No matter what the claims of deponent as to the nature of the expenditures and its business relation to deponent's way of carrying on his business, there was an objection on the part of the defendants which objection would be sustained by the intervention of Mr. Madden.

Deponent, at the trial, personally observed Mr. Madden lean over to Judge Levet when an item had been explained and Mr. Heilly stated that no record of a business connection had been shown and deponent heard Mr. Madden whisper "disallow" to Judge Levet and Judge Levet said he would disallow the item. This item for the \$100. advanced mentioned above was thus treated. Yet, the 1964 return showing the inclusion of the \$100. as a part of the income reported that year had been testified to by deponent. In justification of his decision, Judge Levet said that if deponent argued the point any longer, he would hold deponent for contempt. None of the three defendants came forward

and owned up to the deductibility of the item.

Two or three days before the start of the trial, deponent had delivered several lists of expenses to Mr. Madden showing which were admitted at one time or another by the government officers and which were disputed. There were but a few in dispute. On the day of the trial, the defendants filed a trial memorandum listing a great many items of expense which they said they disputed. Many of them were not disputed by the actual assessment. Some represented a change of heart from previously admitted items of expense.

Deponent had mapped out his order of proof. The first thing was to show that the assessment was incorrect in several important items. Thus the presumption of its correctness would be destroyed. The defendant had testified at a pre-trial deposition that an item of \$1085. and another of \$2276. were not related to any specific items claimed in the return as deductions. This admission would destroy the presumptions mentioned. It would follow that all the new items disputed in the government's brief would be their burden to prove as non-deductible. Well, it didn't work out that way. Instead, the trial court ordered deponent to adduce proof that each item of disallowed expense according to the government's trial brief were correctly claimed as business expenses. Deponent stated that he did not want to try the cause in that posture. He wanted first to show that the assessment was capricious and arbitrary. The court ordered deponent to proceed as he had

requested. Deponent then tried to show that a change of position of the government in disallowing expenses without pleading them was improper. The court threatened deponent with contempt if he did not proceed as ordered. Deponent offered to explain his order of proof but he was directed by the court to proceed to take the items *seriatim* from the government's brief.

On the second day of trial, deponent had occasion to offer into evidence his list of expenses that had been allowed by the auditors or during the litigation. These lists had been delivered to Mr. Madden two days before the trial. On the offer of the lists, the court remarked how could he have examined them when they were thrown at him on the eve of trial. It became apparent that by accepting the government's brief on the date of trial, the court was not aware of deponent's lists and that this was the fault of Mr. Madden who had told Mr. Keilly to prepare a list such as had been prepared by deponent for the court to follow and that when the government's brief came in on the morning of the trial, that brief only was placed before Judge Levet. In fact, Judge Levet stated that he had not seen deponent's brief and that he was not aware of the existence of the lists and he refused to allow them into evidence nor would allow
/the admissions of the government of the allowability of those items theretofore admitted as deductible.

Deponent as trial counsel, pro se, is by law permitted to follow his own order of proof which if he had been allowed to do, he would have shown an arbitrary and capriciously arrived at assessment.

These defendants claimed that they had the right to disallow any items of expense up to the trial date without the loss of the presumption. That was an unlawful exposition of the law. Deponent had served two subpoenas upon Mr. Levine, one to testify as a witness, and the other to bring records regarding the record of the audits made of deponent's return for 1963. He was called as a witness right off to repeat what he had said upon the examination before trial, about the deficiencies in the assessment. Mr. Reilly objected without statement of any ground for his objection. The court sustained him. When asked to explain the reason for such action, the court threatened deponent with contempt and continued to order him to follow the order of the items contained in the government's brief. The fact that that brief was handed to deponent at the opening of trial, that deponent had been busy with many details of proceeding with the trial and he had not read the government's memorandum and he was not prepared to meet the court's demand for proof of the business nature of items that had been denied business expense status/^{at} the trial was lost upon the court.

Also, deponent insisted on testifying about his method of conducting a law office as background into which the various expenses paid would have some meaning. The court refused to permit any such proof to be made. The defendants claimed that such proof was meaningless. The trial was concluded without a showing of the nature of the offer of proof.

There is here no intention to re-try the case tried

before Judge Levett but merely a recitation of what these defendants did to obstruct justice before Judge Levett. Not one of the many unlawful actions committed by Judge Levett were made without the proposal for such action having come from the defendants. Mr. Madden who had a confidential relationship to Judge Levett and who would induce the judge to make the unlawful decisions that were made, aided and abetted in the scheme to lead Judge Levett into the disruption of deponent's plan of proof and of failing to follow the rules regarding the burden of proof.

As a matter of fact, the order of contempt was Mr. Madden's handiwork altogether. Judge Levett had said at the end of the trial that he would entertain an application to abate the penalty of \$50. but when the application was made, he entered an order without a hearing, as required by Rule 42 of Criminal Rules of Procedure, erroneously called the order as one for a civil contempt, and lied in the recital of the procedures followed made in the order that an order to show cause was made which was not the case at all. Nor, was there an opportunity to adduce proof that there was no act of a contemptuous nature committed. As a matter of fact, to this day, despite several formal demands for an opportunity to adduce proof of the facts on the question of contempt, no such hearing has been held and only the bare conclusions stand of record.

Also, Levine testified at the examination that he had worked with the aid of a lawyer's diary given him by deponent in connection with such audit. At the trial, he testified

that he did not have the diary at the audit. The diary was one kept by deponent of his day to day activities. In it, not only did he note what was done for clients but also he noted his cash disbursements, by writing on the day incurred such disbursements as he had incurred and paid for. These disbursements were for stationery, law forms, cable and telegram charges and c.o.d. deliveries and local restaurant expenditures he had paid for a luncheon where he invited a client or an employee of a client to lunch with him. Names and places were recorded. Also, there were recorded cash paid for travel, court fees or telephone charges incurred at pay stations. A few of the items were for over \$25. The majority were for less than \$25. The auditor had allowed all under \$25. He disallowed all over \$25. for lack of a written notation other than the information recorded in the diary to support the claim. This was an arbitrary disallowance. The total was about \$1500. The diary had been shown to the auditor in the auditing department, then to the reviewer at the Appellate Division and finally to Mr. Levine who had been ordered to make a third audit of deponent's books. During the litigation Mr. Reilly had served a notice for an inspection of deponent's books which deponent complied with by bringing the books to Mr. Reilly's office with the diary. Mr. Reilly wanted the books left with him. Deponent objected to departing without the diary and said he would not leave the diary. Mr. Reilly commanded that deponent do as he said or he would make an application to the court to direct sanctions. Deponent called Mr. Reilly's

attention to the fact that the diary contained reference to affairs of his clients, that if he wanted to see the diary, he would have to apply to the court for an order directing deponent to produce the diary, an order which deponent believed would not be made because of the privileged nature of the contents of the diary. Mr. Reilly did nothing further, but, he accepted the books of account and cancelled checks, and bank statements which he returned almost two weeks later.

On the trial, Mr. Reilly took the stand and swore that he was not given the diary although he had formally served a notice for its production. That he had called deponent's attention to the fact that he would ask the court to forbid any evidence thereof at the trial. Of course, no such thing had occurred as he had no power to require the production of the diary or move for sanctions on the trial of the action. That lack of power evidently had no weight with Judge Levet for with Mr. Madden prodding him to act against the plaintiffs, Judge Levet disallowed not only what had been disallowed by the auditors but also all items whether below or above the \$25.

During the trial, Mr. Reilly and Mr. Land both stated that to allow the items whether below or above \$25. there would have to be a record made of the amount, date and place of the luncheon, who was entertained, whether it followed or preceded a business conference and what the nature of the business was. That simply is not the law as deponent had shown but that the item had to be shown as to place and amount but it could be supplemented by oral statements of the taxpayer. This is

explicitly stated in the statute.

Not only that but the diary had in some way been lost in June-July 1972 when deponent moved his offices from 12 John Street to 111 Broadway. At the time of the moving, he was confined to Lenox Hill Hospital undergoing intensive examination following a slight stroke. The moving was being conducted by a young stenographer in deponent's employ. The diary was in his desk along with other diaries of other years. It was decided at the last minute not to move the desk but the things in it would be moved in packages to 111 Broadway. He believed that everything that had been in the desk had been moved. Later, when he had occasion to refer to his diary for 1963, he found all diaries and some check stubs and checks and statements missing. Deponent then phoned the movers. He asked them to check the desk and its drawers. They agreed and called back to say they found nothing. Further search at 12 John Street and at his new offices revealed no sign of the diary.

~~The trial date was approaching. Finally, during~~
conference in chambers, deponent told the court that the diary was missing. ~~Without waiting to hear the circumstances of the~~
case, and the fact that deponent wanted to introduce proof by secondary evidence, the court made the nasty remark about whether it was a habit of deponent to lose important documentary evidence. Without Mr. Madden, deponent felt sure that Judge Levett would not take such a biased view of deponent's actions.

There were other actions by Mr. Madden. Like the time he wrote deponent to order deponent to appear for trial on

Monday, May 7, 1973 or he would dismiss the complaint if deponent failed to appear and make such a record of the default, that deponent would not be able to open the default. See the letter attached.

There was the time when the National Surety item was under discussion. Judge Levet was of a mind that it was a business item but Mr. Reilly was arguing that it was not a legal business matter but with no proof. Judge Levet looked at Mr. Madden who was sitting in the corner of an empty jury box, a few feet away, and Mr. Madden waived his hands and arms in a criss-cross motion to disallow the item and that was what was done. A tax was ordered paid on a sum that was never personally used.

Also at the end of the first day of trial after the judge had left the bench, Mr. Madden had remained behind, and while Mr. Reilly and Mr. Land were gathering up their papers and deponent was also gathering up his papers at the other end of the counsel table, deponent heard Mr. Madden say to Mr. Land and Mr. Reilly, not to forget the other items in the memorandum. Both quickly replied that they would not. Deponent asked Mr. Madden if he didn't have any suggestions for deponent's conduct of the case. He is supposed to be neutral, deponent added. Mr. Madden said he was only talking about a point of procedure.

The rest of the conversation returned to the banter of fellow employees working on a common problem for the employer. Except that deponent thought of the judge's harsh direction to proceed upon the items in the government's brief causing deponent

a dislocation of his order of proof, endangering the proof of the arbitrariness of the assessment, and of the threats of contempt. Deponent asked Mr. Madden whether he didn't think that such decisions were not reversible errors. Mr. Madden made no direct answer, but the next day saw the judge calling upon deponent to put such proof as he wanted in respect to the several items of those listed in defendant's proof, but, at the same time, he would not let deponent go to any other topic but the items listed. So the trial proceeded without a beginning or end of plaintiff's case, and then going on with defendant's case. It first started with the first item in defendant's memorandum and when the last item was discussed, that was the end of the trial. In the interim, the items were allowed or disallowed without proof of how plaintiff's business was conducted, or what ordinarily done in his business and without opportunity of rebuttal or to show evidence of the arbitrariness of the assessment by showing its several errors or of putting in the secondary evidence of the items in the diary.

This was proof that the trial was not a trial according to recognized standards of law respecting the burden of proof, but just a disorderly statement of claims to deductibility with proof on behalf of the plaintiff consisting of his checks, check stub and necessity of the occasion. The court would not allow a certain affidavit prepared by deponent for the auditor's explaining the items which had been allowed by them as deductions, but were disallowed in defendant's brief, into evidence. Yet,

it was a record of admissions by defendant. Both Reilly and Land objected to the affidavit without stating any reasons for their objections and the objections were sustained.

Also, it was shown on the trial and in post trial motions allowed by the court to permit plaintiff to show what other proof he wanted to put before the court, that Mr. Levine had perjured himself on the trial under oath in denying at page 274 of the Minutes that he ever saw the diary because at p. 21, line 3 of the deposition taken under oath he had said that he had seen the diary. Not only that, but he emphasized on the trial that what he had seen on the audit was a yellow sheet of paper listing items said to be diary entries and not the diary. Whereas, on the deposition at p. 111, beginning at line 12 and again at p. 112 at line 25, he stated he had the diary at the time of the audit and took off a tape of all items of expense listed in it. Again at p. 112, beginning at line 25, at Mr. Reilly's questioning, he stated he had had the diary in question at his audit and that besides the diary he had had 18 pages of notes provided by the taxpayer to the Appellate Division.

Among the 18 pages of notes were the copies of pages of yellow sheets he had referred to on the trial. These yellow sheets were marked Exhibit 29 for Identification. In preparing his 1943 return, deponent had transferred from his paid checks all items of business expense onto yellow sheets under various categories. This listing was in lieu of a ledger. Also, he had prepared a list of his cash disbursements, separately, on

several other sheets of yellow paper headed, "Diary" of the items listed in the diary. Altogether the yellow sheets numbered 18. The 18 sheets were shown to the auditor who made photocopies of them and they were given to Mr. Levine with which to check the books and records for a third time. Deponent had the original 18 yellow sheets in court. At the trial in an effort to prove secondary evidence of the items in his diary, he had tried to explain the circumstances of the loss. Mr. Reilly had objected to it without any supporting facts. The court sustained the objection. The offer of proof was rejected but plaintiff was permitted to submit that offer and others in writing after the trial, which was done; see Exhibit B submitted by defendants on their motion. The court denied the offer. The list of items taken from the diary in preparation of stating his return, was offered and marked Exhibit 29 for Identification but it was not allowed in evidence. Also, tape records were made by the first auditor, a Mr. Schulman, of the items in the diary and Mr. Levine stated in the examination before trial that he had made tapes of the items in the diary. These tapes by government officials would be exactly like Exhibit 29 for Identification. Plaintiff wanted them to go into evidence but defendants objected to the production of the tapes made by Mr. Schulman or by Mr. Levine. No reasons were offered for the objections. Both objections were sustained. Yet, the subpoena duces tecum was made a part of the records of the court in the Southern District. There is a copy of the subpoena in the appendix filed in the Court of Appeals which defendant has not included in the papers it offer

on this action. A copy is attached hereto.

Also at the trial, after Mr. Levine had stated that he had not seen the diary at the time of his audit, deponent asked for a short recess to examine a copy of the transcript of the examination. This request for a recess appears at p. 275 of the transcript of the trial which is before this Court. That recess lasted some fifteen or more minutes. As soon as Judge Levett had gone off the Bench, deponent went right to the transcript of the examination before trial. He was turning the pages over when Mr. Reilly and Mr. Land broke off a conversation they were having with the witness, Levine, they approached deponent and requested something of deponent. Deponent wanted to find the spot in the examination before trial where Levine had said he had seen the diary at the time of the audit and he found it difficult to concentrate on the transcript and the request of the defendants. Mr. Land reached over across deponent's shoulder to reach the sheet of 18 yellow pages in front of deponent. Deponent stopped reading and asked what they wanted. They said Exhibit 29 for Identification. Deponent took those pages from the 18 sheets and handed them to Mr. Land. The two of them then went to Mr. Levine and started discussing the sheets, with Mr. Reilly showing the individual sheets in that exhibit separately to Mr. Levine. Deponent found the first place in the transcript of the examination where Mr. Levine had said he had seen the diary at the time of the audit. He was disconcerted by the expectation of the momentary return of Judge Levett and did not go further into the transcript. He looked up and saw

Mr. Reilly and Mr. Land both talking, urgently, to Mr. Levine with reference to Exhibit 29. They were physically pointing to various aspects of that exhibit and talking at the same time.

When the trial resumed, in turn, Mr. Reilly took up the questioning of Mr. Levine about what he had seen at the time of the audit. This time, Mr. Levine said clearly that what he had seen were the yellow pages of Exhibit 29 headed "diary" and not the diary. This was a deliberate perjured statement, suborned by both Mr. Reilly and Mr. Land. Both Reilly and Levine had seen the diary. They could not mistake it for the yellow pages. Both sought the lie to discredit deponent and his claim to an innocent losing of the diary and his further claim to be able to adduce secondary evidence of the items of expense noted therein. The judge refused to allow the evidence in. His decision on the offer of proof is Exhibit C. It is interesting to note the objections offered by Mr. Land and Mr. Reilly. The copy that was served on deponent will be handed up to the court. Then compare it with the decision. With Mr. Madden looking after his friends Reilly and Land, at the judge's elbow, nothing that plaintiff offered was admissible, no matter how clear the admissibility of the records appeared. Note the remark under Conduct of the Trial. That remark states the court's power but plaintiff's problem was that he, as counsel, was not permitted by the court to try the case as counsel thought he should. The conclusory remarks do not justify the many interferences and many misunderstandings of the court induced by Land and Reilly and Madden and Levine which prevented plaintiff from

proving first the arbitrariness of the assessment, Exhibit 2 on the trial and then from properly applying the burden of proof. Then, by order to follow a line of questioning and the abrupt closing of evidence with a direction to supplement the record with written offers of proof which was denied unlawfully but just as had been requested by defendants. ^{Plaintiffs lost their case.} The turning of the tables around to place the burden of proof upon the plaintiff was a wholly unwarranted result of the unlawful actions of Land, Reilly, Levine and Madden.

There are not some four or five isolated items that could be *culled* from the record and the wrongdoing of the parties thus proven. There are innumerable incidents stretching over 406 pages of evidence, over some three motions after trial complete with exhibits; and some three decisions, one of which is 43 pages long. They cannot with justice to this lawsuit be summarized on these motions before trial. They could best be examined under oath upon an oral hearing. Perhaps a trial of the issues could be the best crucible in which to try the question of whether plaintiff's inference of the ultimate facts of this suit are proven by the record and his recollection of what occurred.

Yet, there is the fact that Land and Reilly are in the last analysis lawyers. Very probably they are admitted to practice by the New York courts. They are as much subject as officers of the New York courts to New York statutory law as any other lawyer who has been admitted to practice by New York courts is. Working for the federal government does not give them a license to commit perjury or subornation of perjury or otherwise

to obstruct justice, at least not within the geographical confines of the State of New York. Section 487 of the Judiciary Law of New York forbids attorneys from doing the things done in the tax refund suit by Land and Reilly. That statute imposes a penalty for the crime and it permits a person injured by such action, a recovery for treble damages.

As the breach of this statute is clearly set out in the exhibits offered to this court, these defendants are liable without further litigation to the plaintiffs at least to the extent set forth in the statute. The entitlement of plaintiff to a jury's assessment of punitive damages should be reserved for trial of the whole case to a jury.

WHEREFORE, plaintiffs respectfully pray this Court to deny defendants' motion, to grant partial summary judgment as required by Section 487 of the Judiciary Law and to refer the remainder of plaintiff's request for relief in their complaint to a trial by jury at an early date.

Sworn to before me this
27th day of May, 1977.

ANTHONY B. CATALDO

NOTARY PUBLIC, State of New York
No. 30-0001075
Qualified in Nassau County
Commission Expires March 31, 1978

PLAINTIFFS' COUNTER STATEMENT PURSUANT
TO RULE 9g

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x
ANTHONY B. CATALDO and
ADA CATALDO,

Plaintiffs,

-against-

DAVID P. LAND, T. GORMAN REILLY
and ROBERT E. LEVINE,

Defendants.

PLAINTIFF'S COUNTER-
STATEMENT OF MATERIAL
FACTS NOT DISPUTED, IN
PURSUANCE OF RULE 9(g)
OF THE RULES OF THIS
COURT.

: No. 74 C 1774
:
:
-----x

The following are the material facts on which there is
no genuine issue raised:

1. That plaintiffs are married and reside at Forest
Hills, Queens, New York. Plaintiff Anthony B. Cataldo is an
attorney-at-law duly admitted to practice law in the State of
New York by an order of the Appellate Division, Second
Department made the 14th day of June, 1934. He is duly admitted
to the bar of the Federal Court in the Eastern and Southern
District of New York.

2. That upon information and belief, defendants David
P. Land and T. Gorman Reilly are attorneys and counsellors-at-
law.

3. That in April 1964, plaintiffs duly filed their
Federal Income Tax Return for the year 1963, and sometime
thereafter an assessment was issued by the Internal Revenue
Services alleging that additional tax was due thereon amounting

to \$2210.87 and demanded that sum with interest of \$507.62.

4. That the additional tax assessed was based upon the disallowance of certain business expenses deducted in Schedule C of the return as is shown by letter of the Commissioner of the Internal Revenue dated September 22, 1967, a true copy of which is attached hereto.

5. That plaintiffs paid said sum of \$2718.49 under protest, they duly filed a claim for refund and thereafter duly commenced a suit for the recovery of said sum in the United States District Court for the Southern District of New York.

6. That said suit came on to be heard at a trial held before Hon. Richard H. Levet, without a jury, on the 10th, 11th and 14th days of May, 1973, with defendants David P. Land and T. Gorman Reilly appearing as attorneys for the defendant.

7. That defendant Robert E. Levine was an Internal Revenue Agent who had examined the plaintiff-husband's books and records in respect of their 1963 income tax return and who had appeared as a witness for the defendant in a pre-trial deposition taken pursuant to notice and court order directed to the defendant, and who later appeared as a witness upon the trial pursuant to subpoena duly served upon him.

8. That the decision of the court after trial was to dismiss the complaint. Further, that the plaintiffs prosecuted certain demands for relief before Judge Levet to supplement the record upon the trial but all of such applications for relief were denied by Judge Levett. All such decisions by Judge Levet

adopted the suggestions and arguments of the defendants upon the trial. As a matter of law, said suggestions and arguments did not state the ruling law.

9. That the defendant Robert E. Levine did testify under oath upon the deposition before trial and in answer to questions propounded at p. 21, line 3 of the transcript of said deposition, he stated as follows:

p. 21, line 3:

BY MR. CATALDO:

Q. Were diaries shown to you as well on this examination?

A. Yes.

On p. 111, line 12 as follows:

BY MR. REILLY:

Q. Did Mr. Cataldo show you a lawyer's diary for the year 1963 in connection with certain business expenses?

A. Yes.

Q. Were you allowed to retain that?

A. No, sir.

Q. Was that taken back from you?

A. It was never -- it was part of his books and records, not intended to be taken by me, although I did extract tapes of the total diary expenses indicated.

Also at p. 111, line 25, further questions were asked by Mr. Reilly of Mr. Levine as follows:

Q. Did you have an opportunity to review the statement of expenses submitted by Mr. Cataldo together with his tax return?

* * *

A. Yes, sir.

Then starting at p. 112, line 25, the following appeared:

Q. You mentioned that you did examine the work sheets submitted by Mr. Cataldo with his return, how many pages of the work sheets were there?

A. I think 18 pages.

10. That upon the trial, the same witness, Mr. Levine, testified that he had never seen the diary of the plaintiff-husband but instead, that he was given a certain list of expenses containing amounts only which were then before the Court as part of Plaintiff's Exhibit 29 for Identification which list was not the diary of the plaintiff-husband but was a listing of items by amounts only taken from the diary to be included in Schedule C of the return. This testimony at the trial appears at pages 272 to 321, inclusive of the transcript and exhibit submitted by defendants.

11. That the foregoing changes in the testimony of Levine related to a group of petty cash expenses amounting to \$3823.78 of which total, single items of \$25. or more amounting

to \$1593.55 were disallowed and the amounts less than \$25. each were allowed as business expense amounting to \$2230.31. Attached hereto is Exhibit II on the trial of the suit for refund, the deficiency notice issued by the Commissioner.

12. Levine further changed his testimony given in the deposition about his examination of the diary in question at the time of the audit and said at the trial at p. 278 of the transcript:

Q. Did you make any record of the allowed petty cash disbursements appearing in the diary?

* * *

THE WITNESS: I made a notation that there was an adding machine tape of petty cash items, and those items in excess of \$25. amounted to the \$2200. figure.

BY THE COURT: Did you have any evidence before you as to what the purposes of those items over \$25. were?

p. 279

THE WITNESS: It was merely -- I accepted the taxpayer's yellow cap paper indicating a heading of petty cash.

at p. 282

BY MR. CATALDO:

Q. On these items of \$25. or more, did you check out what the diary said about them?

A. I have no recollection of having seen a diary.
per se.

* * *

Q. But you had the diary available to you, that's
sure, wasn't it?

A. No, sir.

p. 283

BY MR. REILLY:

Q. Mr. Levine, I am showing you 29 for identification,
Plaintiff's Exhibit 29 for identification. Is
that labeled diary at the top?

A. It says diary. Yes, sir.

* * *

Q. Is this the diary you had before you when you
reviewed Mr. Cataldo's claims for petty cash ____

* * *

at p. 284

A. This might have been the nature of the diary
that I had seen.

* * *

at p. 285

Q. You earlier testified also that you saw some
legal cap paper in reviewing petty cash
expenditures, is that correct?

A. Yes, sir.

Q. Is that legal cap paper you have before you,
29 for identification?

* * *

at p. 286

A. The nature of the taxpayer's reporting his
expenses was by recording amounts on yellow cap
paper, a separate page being available with a
heading for that category of expenses, one of
the categories of expenses was petty cash,
which resembled this schedule.

* * *

at p. 288

BY MR. CATALDO:

Q. All right. Isn't there a difference between a
yellow cap and a diary in your mind?

A. Yes, sir. There is.

* * *

at p. 289

Q. Do you have Mr. Lipton's copy of that here in
court or does your attorney have it in court?

* * *

MR. REILLY: Your Honor, we will not produce that.
It's irrelevant.

THE COURT: Go on.

MR. CATALDO: I would like Mr. Lipton's copy to be
produced.

at p. 290

MR. REILLY: Mr. Lipton's note papers? We object to producing it as being irrelevant.

THE COURT: Sustained.

* * *

at p. 292

Q. Did you make a report of what you found to Mr. Lipton of the examination you made?

* * *

A. Yes, I did.

MR. CATALDO: May I have that copy of that report? May I see that report?

at p. 293

MR. REILLY: The government refuses to make such an internal memorandum available.

THE COURT: Sustained.

* * *

at p. 294

BY MR. REILLY:

Q. I am showing you again page 21 of the deposition. The question was, were diaries shown to you? Did you understand that question to refer to Mr. Cataldo's lawyer's diary for 1963?

MR. CATALDO: I object to that question, sir.

THE COURT: Overruled.

* * *

at p. 295

A. My answer was in respect of an understanding that it was the yellow cap paper.

12. That Land and Reilly incorporated in their trial memorandum in the tax refund suit a list of business expense items not previously disallowed by the assessment, and, without amendment to their answer, they claimed that the burden of proving items so listed as business expenses at the trial was upon plaintiff; whereas by reason of admissions made pendente lite and in Mr. Levine's deposition before trial, many of the disallowances contained in said brief and in the assessment were conceded as allowable.

13. The items conceded as allowable pendente lite are set forth in Exhibits 24 and 25 for identification at the trial, true copies of which are submitted herewith.

14. That the claims of Land and Reilly to the burden of proof were incorrect because where an assessment is proven incorrect, the presumption of its regularity is overcome by the taxpayer and the proof of going forward to prove the non-allowability of a business expense is upon the government.

15. That the foregoing recitation of facts and law advanced by Land and Reilly were deliberately planned in the manner stated with full knowledge of the correct rule of law and because of the fact that Mr. Madden would support their unlawful claims to law.

16. That said Land and Reilly also claimed that under

Section 274 IRC, no corroboration by oral testimony could be given to support claimed business expense for entertainment whether above or below \$25. This claim to law was incorrect as the claim of business expense here for entertainment were recorded in the diary and in records made from the diary, in sufficient written memoranda, that with additional corroboration by oral testimony, the business character of the expense could be revealed. The requirements of Section 274 for written records were amply complied with.

17. In espousing such non-existing law, defendants Land and Reilly did so with full knowledge of the true law and in collusion with Mr. Madden that caused their improper view of the law to be accepted by the trial judge.

18. The facts in support of the foregoing claims of law are stated in the transcript of the trial offered by defendants.

19. Defendants Land and Reilly advanced claims to disallow the interest charges claimed in the return as business expense, without support in the facts and despite their allowance by the Commissioner. They did so with knowledge of the prior acceptance by the Government of the business nature of those expenses and against the proof offered to them by the plaintiff to the effect that they were loans made to plaintiff whenever his business bank balance was reduced to an insufficient amount or overdrawn, despite which, the expenses of conducting his law offices had to be payed and loans were thus supplied

to meet them. The said Land and Reilly so undertook to press their unfounded claims as to cause the court to ask the taxpayer without any support in the facts "where do you keep your hidden cash."

Dated: New York, N.Y.
June 2, 1977

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DECISION GRANTING DISMISSAL OF ACTION
AND DENYING CROSS-MOTION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

74 C 1774

ANTHONY B. CATALDO and
ADA CATALDO,

Plaintiffs,

-against-

Memorandum of Decision
and Order

DAVID P. LAND, T. GORMAN
REILLY and ROBERT E.
LEVINE,

Defendants.

June 22, 1977

A P P E A R A N C E S :

For Plaintiffs

ANTHONY B. CATALDO, ESQ., Pro Se
111 Broadway
New York, New York 10006

For Defendants

HONORABLE DAVID G. TRAGER
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Eastern District of New York
225 Cadman Plaza East
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David W. McMorrow, Esq., Of Counsel
Assistant United States Attorney

MISHLER, CH. J.

An Internal Revenue Service ("IRS") audit of

the Cataldos' 1963 joint tax return resulted in a \$2,210.87 deficiency assessment which, along with \$507.62 in interest, plaintiffs subsequently paid under protest. After a claim for the full amount was rejected by the IRS, plaintiffs commenced a refund action in the United States District Court for the Southern District of New York. Defendants David P. Land and T. Gorman Reilly, both Assistant United States Attorneys, were jointly responsible for the government's defense. The case proceeded to trial in May, 1973, and lasted for three days. In an opinion filed on June 29, 1973, the court granted judgment in favor of the government and dismissed plaintiffs' claim with prejudice. That judgment was affirmed by the Court of Appeals in a per curiam decision on June 25, 1974. Cataldo v. United States, 501 F. 2d 396 (2d Cir. 1974).

In November, 1974, plaintiffs commenced the
^{/1} instant action; the complaint charges defendants Land, Reilly and Robert E. Levine, the IRS agent in charge of the Cataldo tax audit, with conspiring to defraud the court

^{/1} The action, originally filed in State Supreme Court, Queens County, was removed to this court on December 16, 1974, pursuant to 28 U.S.C. §1442(a)(1) and (3).

during the trial of the tax refund suit. In brief, plaintiffs allege that Levine wrongfully disregarded a subpoena duces tecum and testified perjurally in the refund trial while defendants Land and Reilly suborned such perjury, advised Levine to ignore the subpoena, and consistently misrepresented the applicable law and operative facts to the court. Plaintiffs claim that defendants' alleged wrongdoing constituted obstruction of justice and caused dismissal of their suit.

For this, the Cataldos seek \$10,000 in compensatory, and \$90,000 in punitive damages. Defendants move, pursuant to Rule 12(c) F.R.Civ.P., for judgment on the pleadings or, in the alternative, for an order pursuant to Rule 56(b) F.R.Civ.P. granting summary judgment. Plaintiffs, in turn, cross move for summary judgment.

Allegations of Misrepresentation

Although the IRS initially allowed a \$2,230.23 deduction constituting petty cash items of less than \$25, the government decided to later contest the amount at trial. Defendants Land and Reilly argued that the government was by no means estopped from making the challenge, and that the

burden of proof on this, as with every claimed deduction in a refund action, remained with the taxpayer. Plaintiffs, while disputing the defendants' right to challenge previously allowed expenditures, argued that the government bore the burden of proof with respect to these additionally contested items. The court sustained the government's position. Cataldo now argues that the defendants deliberately misrepresented the posture of the law causing the burden to be cast on him, and, in turn, his failure.

Allegations of Wrongfully Disregarding a Subpoena

Prior to the commencement of the refund trial, plaintiffs served upon Agent Levine a subpoena demanding the production of all IRS memoranda and records pertaining to the Cataldo audit. Defendants refused to produce the requested items arguing irrelevancy and confidentiality. The court, upholding defendant's position, did not order that the records be furnished. Plaintiffs continue, however, to insist that defendants wrongfully failed to respond to the subpoena duces tecum.

Decision

There exist several avenues of relief from

judgments procured through "fraudulent" conduct. Not only does the right of direct appeal lie, but the Federal Rules of Civil Procedure allow for post trial motions which call for additional findings, see Rule 52(b), for relief from a judgment resulting from fraud or other misconduct, see Rule 60(b), or for a new trial, see Rule 59. Capitalizing on several of these means, plaintiffs raised precisely the same allegations of wrongdoing, not only in the original refund trial, but in a post trial motion to amend the complaint and reopen the proceedings, and again on appeal. The very allegations were specifically rejected by both the trial and appeals courts. Nevertheless, plaintiffs once again assert the same claims. Although their action is styled as one for damages against individual government officials, it is in reality a collateral attack on the judgment rendered in the prior tax refund suit. For the gravamen of their complaint is that the district court would not have dismissed plaintiffs' action but for the alleged wrongdoing of the defendants. Both the rule against collateral attack of a valid judgment and the doctrine of collateral estoppel bar maintenance of this suit.

Fraud that is intrinsic to the prior judicial

proceeding will support neither an independent action collaterally attacking the previous judgment, United States v. Throckmorton, 98 U.S. 61, 68 (1878); Serzysko v. Chase Manhattan Bank, 461 F.2d 699, 702 (2d Cir. 1972), nor an action for damages against the alleged wrongdoers. Griffith v. Bank of New York, 147 F.2d 899, 903 (2d Cir. 1945). There is little question that the fraud alleged by plaintiffs was intrinsic to the tax refund proceeding. It is clear that the information which forms the basis of plaintiffs' claims was in their possession at the time of the Southern District trial. And not only were they presented with the opportunity to raise those allegations, which itself is sufficient to bar a collateral attack, Serzysko v. Chase Manhattan Bank, supra at 702 n.2, they in fact exercised the opportunity. It is evident, therefore, that this action cannot be maintained given the absence of other evidence of fraud.

Moreover, the doctrine of collateral estoppel bars relitigation of plaintiffs' claims. Traditionally defined, parties to a second suit involving a different cause of action are estopped from contesting those matters which were in issue and necessarily determined in a previous suit between them or their privies. Commissioner of Internal

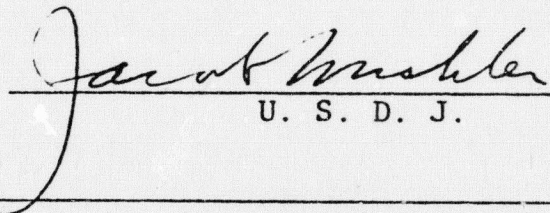
Revenue v. Sunnen, 333 U.S. 591, 597-98, 68 S.Ct. 715, 719 (1948); Harris v. Washington, 404 U.S. 55, 56, 92 S.Ct. 183, 184 (1971); Roth v. McAllister Brothers, Inc., 315 F.2d 143, 145 (2d Cir. 1963). For the defense to attach, three elements need be present: (1) the issues sought to be raised in the second action must have been judicially determined in the prior action; (2) there must have been a final judgment on the merits in the prior suit; and (3) the party against whom the defense is asserted must have been a party to, or in privity with the party to the previous action. Kraeger v. General Electric Co., 497 F.2d 468, 471-72 (2d Cir.), cert. denied, 419 U.S. 861, 95 S.Ct. 111 (1974); Citizen for Community Action at Local Level, Inc. v. Ghezzi, 386 F. Supp. 1, 5 (W.D.N.Y. 1974), vacated on other grounds; Town of Lockport, N.Y. v. Citizens for Community Action at Local Level, Inc., 423 U.S. 808, 96 S.Ct. 11 (1945). There can be no question that all three elements are present here.

Throughout the course of the trial and again in a post trial motion, plaintiffs repeatedly asserted that defendants Land and Reilly had misrepresented the law, "wrongfully" reporting to the court that the burden of proof lay with plaintiffs. In each instance plaintiffs' claims were rejected. So too, plaintiffs charged both at trial and in subsequent motions that defendant Levine had

committed perjury at Land and Reilly's urgings. The court heard Levine's testimony and Cataldo's cross-examination and made appropriate findings. Failing to prevail on any of their claims in the trial court, plaintiffs raised the same allegations on appeal. There again plaintiffs' contentions were rejected, the court finding that the Cataldos were afforded a fair trial. The identity of parties and issues presented in the instant action precludes relitigation.^{/2}

Accordingly, defendants' motion to dismiss is granted and plaintiffs' cross-motion for summary judgment is denied. The Clerk of the Court is directed to enter judgment in favor of defendants and against plaintiffs dismissing the complaint with prejudice, and it is

SO ORDERED.


U. S. D. J.

^{/2}

Finding sufficient grounds to support the dismissal of plaintiffs' suit in the doctrine of collateral estoppel and the rule against collateral attack of a valid judgment, we need not reach defendants' additional claims that the action is barred by the doctrines of quasi-judicial immunity and qualified official immunity or that plaintiffs' allegations do not give rise to cause of action for damages.

COMPLAINT IN TAX REFUND SUIT

SAME CAPTION.

The plaintiffs appearing herein by ANTHONY B. CATALDO, attorney pro se and for his co-plaintiff, for their complaint against the defendant, respectfully shows to this court and upon information and belief, alleges as follows:

FIRST: This action is brought under Title 28 United States Code, Section 1346 (a)(1):--the plaintiffs' claim does not exceed the sum of \$10,000. and arises under the Internal Revenue Laws of the United States, as hereinafter more fully appears.

SECOND: At all the times hereinafter mentioned, the plaintiffs were and now are citizens of the State of New York residing at 1 ASCAN Avenue, Forest Hills, in the County of Queens, State of New York.

THIRD: At all times subsequent to the 9th day of February, 1968, the defendant was and now is a sovereign who has consented to be sued upon claims such as is made herein.

FOURTH: This suit is brought to recover the sum of \$2,718.49 erroneously and illegally assessed against plaintiffs as additional income tax for the calendar year 1963 and as such, erroneously and illegally collected from the plaintiffs by the defendant.

FIFTH: That during the calendar year 1963, plaintiffs earned a total income not in excess of \$4,488.28,

which amount was duly reported and upon which a total tax of \$286.54 was computed and the said amount was duly paid by the plaintiffs along with the filing of their return for the year 1963.

SIXTH: Thereafter the Commissioner of Internal Revenue caused the aforesaid return of the plaintiffs for the year 1963 to be examined and as a result of such examination the Commissioner determined that there was a deficiency in income tax due from the plaintiffs for the calendar year 1963 in the amount of \$2,210.87 and assessed against the plaintiffs as additional income tax for the year 1963 said sum of \$2,210.87. In reaching the determination that there was a deficiency in income tax, due from the plaintiffs for the year 1963, the Commissioner of Internal Revenue refused to allow as a deduction from gross income the following items of business expense:

a.	Schedule C - Association dues and fees; Club expenses; and Petty Cash, travel and entertainment	\$ \$ 4,411.17
b.	Schedule C - Other Expenses	5,092.55
c.	Medical	378.16
d.	Contributions	113.00
e.	State and local sales taxes	60.00
		<u>\$10,054.88</u>

SEVENTH: Thereafter, prior to February 9, 1968, the defendant demanded of the plaintiffs said sum of \$2,210.87

as additional income tax for the year 1963 and in addition thereto, the sum of \$507.62 as interest upon such additional tax and on the said 9th day of February, 1968, the plaintiffs paid to the defendant and the defendant collected from the plaintiffs as additional income tax for the year 1963 said sum of \$2,210.87 and as interest upon such additional tax the sum of \$507.62, or a total of \$2,718.49.

EIGHTH: On or about the 5th day of June, 1968, the plaintiffs duly filed with defendant a claim for the refund of \$2,718.49 alleged to have been erroneously and illegally assessed against and collected from them as income tax and interest thereon for the calendar year 1963, a true copy of which claim for refund is marked Exhibit A and is annexed hereto and made a part hereof.

NINTH: That more than six months have passed since the filing of said application for a refund and the defendant has not responded thereto and said claim for refund stands undecided to date.

TENTH: That the aforesaid deductions disallowed by the Commissioner of Internal Revenue as aforesaid were improperly disallowed because the proof of the propriety of the deductions was arbitrarily disregarded and there is no support in the facts for the disallowances; that by reason of such error, there has been mistakenly and illegally assessed against plaintiffs and collected from them and

paid into the Treasury of the United States as income tax for the year 1963 and as interest thereon, the total sum of \$2,718.49 which sum of \$2,718.49 was illegally and without warrant and authority in law demanded and collected by the defendant from the plaintiffs on the 9th day of February, 1968.

ELEVENTH: Although repayment of said sum of \$2,718.49 was duly demanded by the plaintiffs, no part thereof has been credited, remitted, refunded or repaid to the plaintiffs or to anyone on their account and the full amount thereof together with interest thereon from the 5th day of February, 1968, at the rate of one-half of 1% per month remains due and owing from the defendant to the plaintiffs.

WHEREFORE, plaintiffs demand judgment against the defendant in the sum of \$2,718.49 with interest thereon from February 9, 1968, at the rate of one-half of 1% per month together with the costs and disbursements of this action.

Yours, etc.,

ANTHONY B. CATALDO

CONCLUSIONS OF LAW STATED IN
THE JUDGMENT OF DISMISSAL IN
THE TAX REFUND SUIT

1. This court has jurisdiction over the subject matter and the parties to this action.

2. Plaintiffs are not entitled to a tax refund for the year 1963.

3. Judgment is granted to the United States dismissing the complaint with prejudice.

4. Costs of the action are awarded to the United States.

Settle judgment on notice in accordance herewith.

Dated: New York, N.Y.
June 29, 1973.

RICHARD H. LEVET
United States District Judge

Received one copy of within
appendix this 1st day of Nov. 1977

RECEIVED
U.S. ATTORNEY
Nov 1 2-08
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EAST. DIST. N.Y.

Attorney for Respondents.